NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CARLOS PENA,	:	
	:	Civil Action No. 08-0360 (SRC)
Petitioner,	:	
	:	
v.	:	**OPINION**
	:	
KAREN BALICKI, et al.,	:	
	:	
Respondents.	:	

APPEARANCES:

Petitioner pro se
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South Woods State Prison
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CHESLER, District Judge

Petitioner Carlos Pena, a prisoner currently confined at South Woods State Prison in Bridgeton, New Jersey, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents are Administrator Karen Balicki and the Attorney General of New Jersey.

For the reasons stated herein, the Petition must be denied.

I. BACKGROUND

Pursuant to Sussex County Accusation No. 98-05-00154-A, Petitioner was charged with having committed a burglary in March 1995. Pursuant to Sussex County Indictment No. 96-06-00123-1, Petitioner was charged with murdering his wife in February 1996 and with various related charges, including weapons charges. As of May 1998, various other criminal complaints were pending against Petitioner.

On May 14, 1998, Petitioner entered into plea agreements with respect to the various charges pending against him. With respect to the burglary matter, the plea agreement provided that Petitioner would plead guilty to the third-degree burglary charge, for which the statutory maximum sentence was stated to be five years imprisonment. The charges in two other pending criminal complaints were to be dismissed. In addition, the plea agreement provided that the prosecutor agreed to recommend that the sentence on this accusation would run concurrent with the sentence on the murder indictment. Finally, the plea agreement provided that "Defendant acknowledges that this conviction will serve as a basis for an extended term for the conviction of agg manslaughter as set forth in indictment 96-06-00123."

On the same date, Petitioner entered into a plea agreement with respect to the murder indictment. Petitioner agreed to plead guilty to the lesser-included offense of aggravated

manslaughter, the making of terroristic threats, and possession of a firearm without a permit; various other charges were to be dismissed. This plea agreement reflected that the maximum sentence Petitioner was facing was life imprisonment. This plea agreement also reflected that the prosecutor agreed to recommend that all sentences run concurrently and to recommend a maximum sentence of life imprisonment with 25 years before being eligible for parole. Finally, the plea agreement reflected that an extended term application would be filed and also reflected Petitioner's acknowledgement that he would be receiving an extended term for this aggravated manslaughter conviction.

Petitioner was sentenced pursuant to both plea agreements on June 26, 1998. Petitioner was sentenced to a term of five years' imprisonment on the burglary conviction, with three years' parole ineligibility. Petitioner was sentenced to an extended term of life imprisonment, 25 years without parole, on the aggravated manslaughter charge, five years' imprisonment on the terroristic threats charge, and five years' imprisonment on the firearm charge. All sentences were imposed to run concurrently, for an aggregate sentence of life imprisonment with 25 years' parole ineligibility. This was the maximum potential penalty set forth in the plea agreement.

Petitioner appealed, as excessive, the sentences imposed on the aggravated manslaughter and related convictions under

Indictment No. 96-06-00123-I (the murder and related charges). On January 21, 1999, the Superior Court of New Jersey, Appellate Division, held that the sentence "is not manifestly excessive or unduly punitive and does not constitute an abuse of discretion." On September 22, 1999, the Supreme Court of New Jersey denied certification. State v. Pena, 162 N.J. 131 (1999).

On April 20, 2000, Petitioner filed his first motion for post-conviction relief in state court, asserting that he received ineffective assistance of trial counsel in connection with the plea and sentence, including alleged failures to advise Petitioner of the penal consequences of his plea, to pursue an intoxication defense, and to address Petitioner's allegedly limited ability to read, speak, and understand English. Following a non-evidentiary hearing, the trial court denied the PCR motion on September 24, 2003. On October 26, 2006, the Appellate Division affirmed the denial of relief. State v. Pena, 2006 WL 3025516 (N.J. Super. App. Div. Oct. 26, 2006).

> Defendant has provided no competent evidence to establish a prima facie case of ineffective assistance of counsel. He has submitted no competent evidence that he did not understand the English language at every stage of the proceedings and required the services of an interpreter or that he was under the care of physician or taking medications that would interfere with his ability to enter a knowing and voluntary guilty plea. Under these circumstances, an evidentiary hearing was not required and the petition was properly denied.

2006 WL 3025516 at *2. The Supreme Court of New Jersey denied certification on January 31, 2007. State v. Pena, 189 N.J. 430 (2007).

Petitioner filed a second state motion for post-conviction relief on October 1, 2007, asserting the same claims asserted in the first such petition. Petitioner's second PCR motion was dismissed on January 9, 2009. The dismissal order indicates that the judge found "no good cause" for the second PCR motion.

This Petition, dated January 14, 2008, followed. Petitioner asserts four grounds for habeas relief, all with respect to the convictions under the murder indictment: (A) New Jersey's sentencing scheme is unconstitutional because it permits aggravating factors not admitted by the petitioner in his guilty plea to be found by judges by a preponderance of the evidence; (B) the sentencing court failed to take into account mitigating factor eight under N.J.S.A. 2C:44-1B; (C) the prosecutor cannot be guaranteed by the judge that a particular sentence will be imposed nor can the prosecution place any restrictions on counsel during such a critical stage of the criminal proceedings; (D) N.J.S.A. 2C:44-5 is unconstitutional because it permits a court to impose consecutive sentences based on judge-made findings. In the "Conclusion" of his brief in support of his Petition, Petitioner characterizes these "errors" as evidence of ineffective assistance of trial counsel.

Respondents assert that claim (B) is a state-law claim which does not provide a basis for federal habeas relief, that the other claims are unexhausted, and that all claims are, nevertheless, meritless. Petitioner has not filed a reply. This matter is now ready for disposition.

II. 28 U.S.C. § 2254

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 now provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

With respect to any claim adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determinated by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the

state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., for the Court, Part II). A state court decision "involve[s] an unreasonable application" of federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and may involve an "unreasonable application" of federal law "if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," (although the Supreme Court expressly declined to decide the latter). Id. at 407-09. To be an "unreasonable application" of clearly established federal law, the state court's application must be objectively unreasonable. Id. at 409. In determining whether the state court's application of Supreme Court precedent was objectively unreasonable, a habeas court may consider the decisions of inferior federal courts. Matteo v. Superintendent, 171 F.3d 877, 890 (3d Cir. 1999).

Even a summary adjudication by the state court on the merits of a claim is entitled to § 2254(d) deference. Chadwick v. Janecka, 302 F.3d 107, 116 (3d Cir. 2002) (citing Weeks v.

Angelone, 528 U.S. 225, 237 (2000)). With respect to claims presented to, but unadjudicated by, the state courts, however, a federal court may exercise pre-AEDPA independent judgment. See Hameen v. State of Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, 532 U.S. 924 (2001); Purnell v. Hendricks, 2000 WL 1523144, *6 n.4 (D.N.J. 2000). See also Schoenberger v. Russell, 290 F.3d 831, 842 (6th Cir. 2002) (Moore, J., concurring) (and cases discussed therein).

The deference required by § 2254(d) applies without regard to whether the state court cites to Supreme Court or other federal caselaw, "as long as the reasoning of the state court does not contradict relevant Supreme Court precedent." Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) (citing Early v. Packer, 537 U.S. 3 (2002); Woodford v. Visciotti, 537 U.S. 19 (2002)).

Although a petition for writ of habeas corpus may not be granted if the Petitioner has failed to exhaust his remedies in state court, a petition may be denied on the merits notwithstanding the petitioner's failure to exhaust his state court remedies. See 28 U.S.C. § 2254(b)(2); Lambert v. Blackwell, 387 F.3d 210, 260 n.42 (3d Cir. 2004); Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003).

Finally, a pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle

v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989); United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970).]

III. ANALYSIS

A. Sentencing Claims

Petitioner contends that New Jersey's sentencing scheme is unconstitutional because (1) it permits aggravating factors not admitted by the prisoner in his guilty plea to be found by judges by a preponderance of the evidence, rather than by a jury under the Sixth Amendment "beyond a reasonable doubt" standard, see N.J.S.A. 2C:44-1f(1), and (2) it permits a court to impose consecutive sentences based on such judge-made findings, see N.J.S.A. 2C:44-5. Thus, Petitioner contends that the trial judge improperly sentenced him to a term greater than the presumptive term for aggravated manslaughter, in violation of the rule announced in Blakely v. Washington, 542 U.S. 296 (2004), described more fully below.

A federal court's ability to review state sentences is limited to challenges based upon "proscribed federal grounds such as being cruel and unusual, racially or ethnically motivated, or

enhanced by indigencies." See Grecco v. O'Lone, 661, F.Supp. 408, 415 (D.N.J. 1987) (citation omitted). Thus, a challenge to a state court's discretion at sentencing is not reviewable in a federal habeas proceeding unless it violates a separate federal constitutional limitation. See Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984). See also 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990). Petitioner's claim is based upon the Sixth Amendment right to trial by jury.

In Apprendi v. New Jersey, 530 U.S. 466, 471, 490 (2000), pursuant to the Sixth Amendment right to trial by jury, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court overturned a sentence imposed under Washington state's sentencing system, explaining that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 542 U.S. at 302 (internal quotations omitted). Most recently, in United States v. Booker, 543 U.S. 220 (2005), the Supreme Court applied the rule of Apprendi to the United States

Sentencing Guidelines, finding the Guidelines unconstitutional, and rendering them merely advisory, rather than mandatory.

In State v. Natale, 184 N.J. 458 (N.J. 2005), the Supreme Court of New Jersey evaluated the constitutionality of the New Jersey sentencing scheme in light of the Apprendi line of cases.

> Our Code provisions make clear that, before any judicial factfinding, the maximum sentence that can be imposed based on a jury verdict or guilty plea is the presumptive term. Accordingly, the "statutory maximum" for Blakely and Booker purposes is the presumptive sentence.

Natale, 184 N.J. at 484. Because the Code's system allows for sentencing beyond the statutory maximum presumptive term, the Supreme Court of New Jersey found the state sentencing system unconstitutional and determined that the appropriate remedy would be to follow the lead of Booker and abolish the presumptive terms. "Without presumptive terms, the 'statutory maximum' authorized by the jury verdict or the facts admitted by a defendant at his guilty plea is the top of the sentencing range for the crime charged, e.g., ten years for a second-degree offense." Natale, 184 N.J. at 487 (citation omitted). The Supreme Court of New Jersey held that the rule it announced in Natale is applicable retroactively only to cases in the direct appeal pipeline as of the date of that decision, August 2, 2005. Natale, 184 N.J. at 494. Petitioner had already concluded his direct appeals by the date of the Natale decision; thus, the Natale decision would not entitle him to relief in state court.

Similarly, the Court of Appeals for the Third Circuit generally has held that the rules announced in the Apprendi line of cases are not applicable retroactively to cases on federal collateral review. See generally In re Olopade, 403 F.3d 159 (3d Cir. 2005) (finding that the decision of the supreme Court in Booker does not apply retroactively to cases on collateral review); United States v. Swinton, 333 F.3d 481 (3d Cir.), cert. denied, 540 U.S. 977 (2003) (holding that Apprendi does not apply retroactively to cases on collateral review); In re Turner, 267 F.3d 225 (3d Cir. 2001) (holding that Apprendi does not apply retroactively to cases on collateral review). See also United States v. Price, 400 F.3d 844, 849 (10th Cir.), cert. denied, 126 S.Ct. 731 (2005) (Blakely does not apply retroactively to cases on collateral review). Thus, in this collateral proceeding, Petitioner is not entitled to relief on the claim that his life sentence was imposed based upon judicial fact-finding, in violation of the Sixth Amendment right to trial by jury.

The appellate courts of New Jersey also have rejected the argument that the imposition of consecutive sentences implicates the Blakely line of cases or otherwise violates the Sixth Amendment right to a jury trial.[1]

[1] All documentation provided to this Court indicates that Petitioner was sentenced to concurrent terms on all charges. Accordingly, on that basis alone, this claim appears to be meritless. Out of an abundance of caution, however, in the event the record provided to this Court is incomplete and Petitioner

> Under our sentencing scheme, there is no presumption in favor of concurrent sentences and therefore the maximum potential sentence authorized by the jury verdict is the aggregate of sentences for multiple convictions. See N.J.S.A. 2C:44-5(a). In other words, the sentencing range is the maximum sentence for each offense added to every other offense. ...
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> In that vein, consecutive sentences do not invoke the same concerns that troubled the Supreme Court in Apprendi, supra, Blakely, supra, and Booker, supra. As in any indeterminate sentencing scheme, the jury verdict in this case allowed the judge to impose a consecutive or concurrent sentence within the maximum range based on the sentencing court's discretionary findings.

State v. Abdullah, 184 N.J. 497, 514-15 (2005). See also State v. Pittman, 2006 WL 561278, *2 (N.J. Super. App.Div. March 9, 2006), certif. denied, 186 N.J. 604 (2006) ("Because 'there is no presumption in favor of concurrent sentences,' findings relevant to consecutive sentences need not be made by a jury." (quoting State v. Abdullah, 184 N.J. at 513)).

This Court agrees. Where, as here, there is no presumption under state law in favor of concurrent sentences, consecutive sentences do not exceed the prescribed statutory maximum sentence; thus, the Sixth Amendment right to a jury trial is not implicated. Petitioner is not entitled to relief on this ground.

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was sentenced to consecutive terms, the Court will address this issue.

B. Consideration of Mitigating Factors

Petitioner contends that the sentencing court erred by failing to take into consideration mitigating factor eight under N.J.S.A. 2C:44-1b.

It is well-established that the violation of a right created by state law is not cognizable as a basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" (quoting Lewis v. Jeffers, 497 U.S. 764, 680 (1990))). See also 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." (emphasis added)). Accordingly, Petitioner is not entitled to federal habeas relief on this ground.[2]

C. Sentencing Pursuant to Plea Agreement

Petitioner contends that, in connection with sentencing pursuant to a plea agreement, the prosecutor cannot be guaranteed by the judge that a particular sentence will be imposed nor can the prosecution place any restrictions on counsel during such a critical stage of the criminal proceedings. More specifically,

[2] This Court expresses no opinion as to whether the sentence violates state law as alleged by Petitioner.

Petitioner asserts that his counsel made a deficient argument at sentencing, theoretically based upon some agreement with the prosecutor, which this Court construes as a claim that Petitioner was deprived of the Sixth Amendment right to effective assistance of counsel.[3] Respondents have construed this allegation as a due

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[3] The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel is "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that his counsel's performance fell below an objective standard of reasonable professional assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland at 694. Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

The performance and prejudice prongs of Strickland may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id. at 697.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. If counsel has been deficient in any way, however, the habeas court must determine whether the cumulative effect of

process claim. Whether construed as a claim of due process violation or ineffective assistance of counsel, it is meritless.

The plea agreements set forth the potential maximum sentence to which Petitioner could be subjected. Plaintiff entered his guilty plea on May 14, 1998. A pre-sentence report was prepared on May 29, 1998. Petitioner made no substantial corrections to that report, which was delivered to the trial court for its consideration. Prior to sentencing, the trial court received letters from Petitioner and his relatives. During the sentencing hearing on June 26, 1998, Petitioner's counsel argued strenuously in favor of mitigation and against consideration of various aggravating circumstances. In delivering sentence, the trial judge indicated that he had reviewed all the documentation and argument submitted, including psychiatric reports, and provided detailed reasons for his sentence.

Petitioner, himself, concedes that he has no evidence of impropriety in connection with the plea or sentencing.

> Here, counsel made a minimum argument at best and the inference can be drawn that this was due to the prosecution. Counsel did not argue the mitigating factor [eight]. ...
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> Any restriction may have very well deterred counsel from arguing that the Petitioner was not being sentenced to the appropriate degree and was in fact, a candidate for a downgraded sentence ..., which permits

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counsel's errors prejudiced the defendant within the meaning of Strickland. See Berryman v. Morton, 100 F.3d 1089, 1101-02 (3d Cir. 1996).

> the Court to sentence the Petitioner to a term more appropriate to a crime that is proper and one degree lower, if it is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and more importantly, where the interest of justice demands.
>
> It is unclear how or why any restriction was agreed upon and or implemented. However, it would appear that counsel was under some type of restraints by the Prosecution, or it is simply just another example of counsel ineffectiveness. If there was any type of restriction verbally or written, the Petitioner was deprived of effective assistance of counsel during a critical stage of the criminal proceeding.
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> Nevertheless, Petitioner was entitled to an effective and forceful argument to the sentencing court by his counsel, stressing that the nature of and relevant surrounding circumstances pertaining to the offense and the "facts personal to Petitioner" justified invocation of the downgrading provision.
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> In short, the Petitioner cannot say with exact confidence that there was such a restriction upon defense counsel. However, do [sic] to his meaningless argument it can be speculate at best that there was.

(Petitioner's Brief at 9-11.)

Petitioner's suggestion that there was some sort of agreement among his counsel, the judge, and the prosecutor to impose the maximum sentence, or to avoid making an appropriate argument for less than the maximum sentence, is mere speculation on Petitioner's part. The record reflects that Petitioner's counsel made a strenuous argument for a sentence at the lower end of the applicable range and that the trial judge provided ample reasons for rejecting that argument and for imposing the maximum sentence. Petitioner has established neither a deprivation of

his right to due process nor ineffective assistance of counsel. Petitioner is not entitled to relief on this claim.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. No certificate of appealability shall issue.

V. CONCLUSION

For the reasons set forth above, the Petition must be denied. An appropriate order follows.

s/ Stanley R. Chesler
Stanley R. Chesler
United States District Judge

Dated: February 4, 2009